STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 95B001

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RUBEN RODRIGUEZ,

Complainant,

v.

DEPARTMENT OF TRANSPORTATION, Respondent.

The hearing in this matter was held on July 11, 1995, in Denver, CO before Administrative Law Judge Margot W. Jones. Respondent appeared at the hearing through Michael E. King, Assistant Attorney General. Complainant, Ruben Rodriguez, appeared pro se. Catherine Garcia, a business representative for the Colorado Federation of Public Employees, appeared at the hearing for the limited purpose of requesting a continuance of the hearing date.

Respondent called Ken Conyers and Mary Dugan, employees of the Department of Transportation (Department), as witnesses to testify at hearing. Complainant testified in his own behalf. Complainant failed to file a prehearing statement and therefore did not endorse witness to appear at hearing.

PRELIMINARY MATTERS

1. At the commencement of the hearing, on July 11, 1995, Catherine Garica, business representative for the Colorado Federation of Public Employees, entered her appearance on Complainant's behalf for the limited purpose of requesting a continuance of the hearing. Garcia represented that legal counsel was not contacted to represent Complainant at the hearing and a prehearing statement was not filed on Complainant's behalf due to oversight on her part.

Respondent opposed the motion to continue the hearing. Respondent represented that it was prepared to proceed at hearing and that witnesses, Conyers and Dugan, travelled significant distances to be present at the hearing. Respondent maintained that it should not be required to incur the additional expense which would be caused by a continuance.

Complainant's motion to continue the hearing date was denied. Complainant failed to state good cause for a continuance. Garcia withdrew as Complainant's representative. Complainant proceeded at hearing $\underline{\text{pro}}$ $\underline{\text{se}}$.

2. As a preliminary matter, Complainant indicated his intent to raise the issue of retaliation. Respondent moved to strike the issue of retaliation for failure to properly raise the issue prior to hearing.

Respondent's motion was granted because Complainant failed to properly raise the issue of retaliation prior to hearing.

3. Complainant withdrew his claim of discrimination based on national origin.

MATTER APPEALED

Complainant appeals Respondent's decision to impose a one step disciplinary demotion.

ISSUES

- 1. Whether Complainant engaged in the conduct for which discipline was imposed.
- 2. Whether the conduct provided basis to impose a disciplinary action.
- 3. Whether Respondent's decision to impose a one step disciplinary demotion was arbitrary, capricious or contrary to rule or law.
- 4. Whether Complainant sustained his burden to establish that he had an emotional disability for which Respondent was required to offer a reasonable accommodation.

FINDINGS OF FACT

- 1. Complainant, Ruben Rodriguez (Rodriguez), was a certified employee of the Department of Transportation. The length of his employment was not established at hearing. Rodriguez was employed as a heavy maintenance worker.
- 2. As a heavy maintenance worker, Rodriguez operated equipment and vehicles. He is required to possess a valid Commercial Driver's License (CDL) as a condition of employment. He possessed a valid CDL until April 22, 1994, when he received a citation for driving under the influence of alcohol.
- 3. On April 30, 1994, Rodriguez came forward and advised Department managers that he received a citation for driving under the influence. He advised that following his appearance in court, his license would be suspended for a period of time.

- 4. By notice dated May 2, 1994, Ken Conyers, the appointing authority, notified Rodriguez that a Board Rule R8-3-3 meeting would be held on May 24, 1994. Conyers, Rodriguez and Mary Dugan, the Equal Employment Officer for the Department, were present at the R8-3-3 meeting. Rodriguez reported that his license was revoked until September 14, 1994.
- 5. The Department maintains a "Region Management Team" made up of Department managers. Their purpose, among others, is to discuss the facts of pending disciplinary actions and make recommendations regarding the appropriate discipline to impose.
- 6. The "Region Management Team" reviewed the facts of Rodriguez' situation. The team recommended that Rodriguez be demoted and that he be required to exhaust his annual leave during the period of the revocation of his license.
- 7. Conyers accepted the managers' recommendation and advised Rodriguez, by letter, dated June 21, 1994, that he was required to exhaust his annual leave during the period of the suspension of his CDL. Rodriguez was further advised that if he exhausted all annual leave before September 14, 1994, he would be required to return to work and perform duties that did not require operation of a vehicle or equipment. Rodriguez was advised that this arrangement would not extend beyond September 14, 1994. If Rodriguez' license was not reinstated on September 14, 1994, his situation would be reevaluated in terms of his continued employment.
- 8. In the June 21, 1994, notice of disciplinary action Rodriguez was also advised of the imposition of a one pay grade disciplinary demotion for a period of six months.
- 9. In reaching the decision to impose disciplinary action, Conyers considered mitigating circumstances involved in Rodriguez' loss of his license. Rodriguez' brother died a short time prior to April, 1994, when Rodriguez was cited for driving under the influence of alcohol. Rodriguez was depressed as a result of the loss of his brother. Rodriguez was granted 40 hours of funeral leave at the time of his brother's death. Rodriguez also lived in La Junta, which is small town, where Rodriguez found little else to do besides drink alcohol.
- 10. In mitigation, Conyers also considered the fact that Rodriguez had a good employment history. Rodriguez was not previously disciplined during his employment with the Department.
- 11. Rodriguez received the disciplinary action of June 21, 1994, on June 25, 1994. He appealed the discipline. On July 27, 1994, Conyers rescinded the June 21, 1994, disciplinary action. Conyers

learned that he could not require Rodriguez to forfeit his annual leave as a disciplinary measure. Conyers advised Rodriguez that all his annual leave would be reinstated to his leave account. The one pay grade disciplinary demotion for six months remained effective. Rodriguez was placed on leave without pay status effective August 1, 1994, through September 14, 1994.

- 12. Rodriguez was erroneously required to use annual leave for the period of the suspension of his CDL. When the error was discovered and Rodriguez was notified, on July 27, 1994, his annual leave was reinstated and he was placed on leave without pay status through September 14, 1994. Convers' solution to rectify the error resulted in Rodriguez receiving pay for the period of the suspension of his CDL license, when he was not permitted to work, from April, 1994, to August 1, 1994.
- 13. The July 27, 1994, disciplinary action was made apart of this appeal.
- 14. Rodriguez' appeal includes allegations of discrimination. The appeal was referred to the Colorado Civil Rights Division for investigation (CCRD). On May 2, 1995, the matter was referred back to the Board with notice that CCRD found no probable cause to believe that discrimination occurred.

DISCUSSION

Certified state employees have a protected property interest in their employment and the burden is on Respondent in a disciplinary proceeding to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); Section 24-4-105 (7), C.R.S. (1988 Repl. Vol. 10A). The board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously or in violation of rule or law. Section 24-50-103 (6), C.R.S. (1988 Repl. Vol. 10B).

The arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Veqt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

Complainant contends that he suffered from a mental disability caused by stress related to the loss of a family member. He contends that when he requested funeral leave to attend to the needs of his family, the leave was denied, which added to his stress. Complainant argues that he drank excessive amounts of

alcohol during this period of grief to relieve the stress that he felt. Finally, Complainant contends that he should not have been disciplined because he has been a good employee and the discipline imposed amounts to kicking him while he is down.

Complainant does not challenge the prehearing process used here. However, it is his contention that he should not have been required to use his annual leave during the period of the suspension of his CDL license, he should not have been placed on leave without pay from August 1, 1994, to September 14, 1994, and he should not have been demoted one pay grade for a six month period.

Respondent contends that it sustained its burden to establish that Complainant engaged in the conduct for which discipline was imposed. Respondent further contends that the conduct proven to have occurred warranted disciplinary action. Finally, Respondent maintains that it established that placing Complainant on leave without pay during the period of the suspension of his CDL and the one pay grade demotion for a six month period was shown to be neither arbitrary, capricious or contrary to rule or law.

Complainant presented no evidence that he suffered from an emotional disability requiring that Respondent provide reasonable accommodation. The evidence established that Complainant was provided a reasonable period of funeral leave when his brother died. The evidence further established that Complainant was required as a condition of employment to maintain a valid CDL and that he failed to do so. Since the CDL was a condition of employment, Respondent was under no obligation to permit Complainant to continue to appear for work when he lacked a required license.

Respondent acted neither arbitrarily, capriciously nor contrary to rule or law, when it required Complainant to be placed on leave without pay for the period from August 1, 1994, to September 14, 1994. To the contrary, Complainant experienced a windfall when Respondent corrected its error of deducting annual leave for the period during which Complainant's CDL was suspended. This permitted Complainant to remain on paid leave for the period from the suspension of his license to August 1, 1994.

Likewise, the imposition of a disciplinary demotion for a six month period was also lawful in light of Complainant's conduct. More severe discipline may have been within range of the alternatives available to a reasonable and prudent administrator under the facts proven here. Yet, Complainant received a relatively mild disciplinary sanction.

CONCLUSIONS OF LAW

- 1. Respondent established that Complainant engaged in the conduct for which discipline was imposed.
- 2. The conduct proven to have occurred justified the imposition of discipline.

- 3. The decision to place Complainant on leave without pay and to impose a one pay grade disciplinary demotion for a six month period was neither arbitrary, capricious or contrary to rule or law.
- 4. Complainant failed to establish that Respondent's actions were discriminatory.

ORDER

The action of the Respondent is affirmed. The appeal is dismissed with prejudice.

DATED this 7th day of August, 1995, at Denver, Colorado.

Margot W. Jones Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

- 1.To abide by the decision of the Administrative Law Judge ("ALJ").
- 2.To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties and advance the cost therefor. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. <u>Vendetti v.</u> <u>University of Southern Colorado</u>, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is The estimated cost to prepare the record on appeal in this case with a transcript is <u>\$257.00</u>. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on the _____ day of August, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Catherine Garcia Colorado Federation of Public Employees 1580 Logan St., #310 Denver, CO 80203

Ruben Rodriguez P.O. Box 71 La Junta, CO 81050

and to the respondent's representative in the interagency mail, addressed as follows:

Michael E. King Assistant Attorney General Department of Law, Natural Resources Section 1525 Sherman St., 5th Floor Denver, CO 80203